FILE COPY

Office-Supreme Court, U.S.
FILED
DEC 1 1959
JAMES R. BROWNING, Clerk

No. 48

In the Supreme Court of the United States

October Term, 1959

---

v.

INDEX

	Page
Statement	1
Discussion	3
I. The initiation of the second prosecution was contrary to sound policy	3
II. The Court has power, on motion of the Government, to vacate the judgment of conviction in a case pending before it on direct review, and to direct dismissal of the indictment	6
A. Equitable enforcement of the criminal laws requires some means for terminating criminal prosecutions pending on appeal	7
B. There is a close parallel for this purpose between civil and criminal litigation	8
C. The common law limitations on the entry of a *nolle prosequi* are not applicable to a dismissal with prejudice	11
III. This Court may make a final disposition of the motion and a remand of the case to the district court for consideration of the motion is unnecessary	16
Conclusion	17
Appendix	19

CITATIONS

Cases:

Abbate v. *United States*, 359 U.S. 187	4, 5
Commonwealth v. *Dascalakis*, 246 Mass. 12	15
Commonwealth v. *Smith*, 149 Mass. 7	14
Commonwealth v. *Tuck*, 20 Pick. (Mass.) 356	12, 14
Confiscation Cases, 7 Wall. 454	10, 12, 16
Dealy v. *United States*, 152 U.S. 539	12
District Attorney, State ex rel. v. *Judge*, 48 La. Ann. 109	15

both in Baltimore and in Philadelphia. As a defense to deportation, a claim was fabricated that Kostatos was born in the United States. Kostatos himself and one Sitaras so testified in the Baltimore hearings and others did so in the Philadelphia hearings. When the fraud was discovered, petitioner, Kostatos, Sitaras, and three other witnesses were indicted in the Eastern District of Pennsylvania for conspiring to make false statements to an agency of the United States.[1] Petitioner was also separately indicted for suborning perjury at the Philadelphia hearings. All of petitioner's co-defendants in the conspiracy indictment pleaded guilty. Petitioner went to trial on both indictments, but, at the close of the Government's case, he changed his plea to *nolo contendere* to the false-statement conspiracy charge and the Government dismissed the subornation indictment. Petitioner was fined $500 and sentenced to two-months' imprisonment, which he served.

Thereafter, petitioner was indicted in the District of Maryland for suborning the perjury of Kostatos and Sitaras at the Baltimore hearings. The testimony of those two witnesses had been alleged as two of the overt acts in the Pennsylvania conspiracy indictment. Petitioner's claim of double jeopardy was rejected, he was convicted and sentenced to six-months' imprisonment, and the conviction was affirmed by the court of appeals.

---

[1] A second count of the conspiracy indictment also charged a conspiracy to obstruct the administration of the deportation laws, but that count was dismissed as to petitioner before trial and was later dismissed as to the other defendants as well.

When a petition for a writ of certiorari was filed raising the double-jeopardy question, the Government did not oppose its grant but informed the Court that the case was under consideration to determine whether the second prosecution was consistent with sound policy and whether, if not, it would be appropriate to seek vacation of the judgment and dismissal of the indictment. This motion is the result of that consideration.

DISCUSSION

As stated in our memorandum in response to the petition for certiorari, we agree with the well-reasoned opinions of both courts below that the offenses of conspiring to make false statements and of suborning perjury are separate crimes the separate prosecutions for which did not violate the double jeopardy clause of the Fifth Amendment. However, the Department of Justice has a responsibility for the control of Government litigation that is not confined to avoidance of legal error but extends to the formulation and implementation of enlightened and proper prosecutorial policies. In recognition of that responsibility, it has been concluded that the initiation of the second prosecution in this case was contrary to sound policy and that for that reason, and in the interests of justice, the indictment should be dismissed. The reasons for that conclusion are developed below.

I

THE INITIATION OF THE SECOND PROSECUTION WAS CONTRARY TO SOUND POLICY

It has generally been the policy of the Federal Government that several offenses arising out of a single

transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement. The policy is closely related to that against duplicating federal-state prosecutions that was recently reaffirmed following this Court's decision in *Abbate* v. *United States*, 359 U.S. 187, holding that the double jeopardy clause did not bar a federal prosecution for the same act for which the defendant had already been prosecuted by a state. Following that decision, the Attorney General issued a memorandum to the United States Attorneys (set forth *infra*, pp. 19–21) stating that, when a state prosecution has already been had, "there should be no federal trial for the same act or acts unless the reasons are compelling" and directing that no such prosecution be instituted without the approval of the appropriate Assistant Attorney General, the matter having first been brought to the personal attention of the Attorney General. The policy against multiple federal prosecutions is *a fortiori* to that against duplicating state-federal prosecutions, for there are more practical reasons why the Federal Government ought not be foreclosed by the prior actions of the states than there are for separately prosecuting federal crimes.

The policy against multiple prosecutions does not foreclose the possibility that there may be exceptional circumstances in which separate prosecutions for crimes arising out of the same transaction would be justified—a question which, necessarily, can be re-

solved only as such alleged circumstances present themselves. After full investigation, we are satisfied that no such circumstances exist here and that the second prosecution was not in accord with the sound policy against multiple prosecutions. It is for that reason that this motion is being filed.

A related factor supporting this motion is that, because of the policy against multiple prosecutions, the legal question presented by this case is for all practical purposes academic—particularly in view of the Attorney General's statement following the *Abbate* case. Unless this case is dismissed, therefore, the Court will be forced to decide a difficult constitutional question as to the propriety of action that was taken here by inadvertence and which the Government does not intend to take in the future.[2] In view of the frequently-reiterated policy of the Court of avoiding unnecessary constitutional pronouncements, it would be a disservice to the Court, we believe, to allow an unsound prosecution to force upon it decision of a constitutional question that is not of present or potential practical importance. And avoid-

[2] The question whether conspiracy to make false statements and subornation of perjury are separate crimes could, of course, arise in a case in which they are tried together and the question is whether separate sentences may be imposed, but in our view the questions of separate prosecutions and of separate sentences involve different considerations, at least in part. It is also true, as noted above, that the policy does not foreclose the possibility that a case may some day arise in which the circumstances are thought to justify separate prosecutions, but we think it will be time enough to consider that problem when that case arises. And, in such a case, it may be that the circumstances justifying the prosecutorial decision would also have an important bearing on the constitutional question.

ance of unnecessary constitutional decisions is equally in the interests of the Government, for the implications of such decisions can never be fully anticipated and they may ultimately affect interests much more vital than those immediately in issue. If the Government has, as here, no intention of exercising the power in issue, it is not to its interest to permit a case brought in contravention of sound policy to force a decision on the constitutionality of that power.

In this case, therefore, fairness to the petitioner, the interest of the Court in avoiding unnecessary constitutional decisions, and sound litigation policy on the part of the Government all coincide to support the judgment of the Department that the case should be dismissed.

II

THE COURT HAS POWER, ON MOTION OF THE GOVERNMENT, TO VACATE THE JUDGMENT OF CONVICTION IN A CASE PENDING BEFORE IT ON DIRECT REVIEW, AND TO DIRECT DISMISSAL OF THE INDICTMENT

We know of no obstacle to the Court's granting a motion to dismiss an indictment pending appeal from a judgment of conviction. Manifestly, the outstanding judgment of conviction must first be vacated in order to dismiss the indictment, but since that judgment is before the Court on direct review it has not yet become final and is within the plenary power of the Court.[3] Clearly, therefore, the Court

[3] We do not contend that the same power would exist in a proceeding involving only a collateral attack upon a judgment that has already become final, such as a proceeding in habeas corpus or under 28 U.S.C. 2255. In such proceedings the

has the *power* to take the action requested—vacation of the judgment and dismissal of the indictment—and, as we shall show, there is no reason either of policy or of law why that power should not be exercised in an appropriate case.

A. EQUITABLE ENFORCEMENT OF THE CRIMINAL LAWS REQUIRES SOME MEANS FOR TERMINATING CRIMINAL PROSECUTIONS PENDING ON APPEAL

Unless the Court has power, on motion of the Government, to dismiss an indictment pending appeal, the Department of Justice would have no control over a criminal case once it had gone to judgment in the trial court. If the defendant appealed the conviction, the Government would have no choice but to defend it on the merits[4] however unwise or contrary to policy the prosecution, however great the resulting injustice to the defendant, and however academic the issue may be for the future.

To a large degree, of course, prosecutorial policies can be effectuated by control over the initiation of criminal prosecutions by means of instructions to the United States Attorneys. With 94 different United States Attorneys initiating over 30,000 criminal prosecutions a year, however, occasional misunderstandings or differences in interpretation of announced pol-

court itself has only limited powers and may nullify the judgment only on grounds going to jurisdiction of the sentencing court.

[4] In the rare case in which there has been clear legal error, a confession of error can of course be filed, but that still requires a determination by the court on the merits (*Young* v. *United States*, 315 U.S. 257), and is very different from power to control litigation for reasons of sound policy.

icies are inevitable. In addition, not all the problems can be foreseen, and there may be no occasion to formulate a departmental policy until the attention of the Department is focussed upon the problem by a case which has already gone to judgment. And the circumstances making the formulation or change of a policy appropriate may arise only after a conviction has been had—for example, an intervening judicial decision, a change in the statute, or as in this case a specific clarification of the policy of the Department of Justice following a decision of this Court.

For these reasons, effective and enlightened control by the Department over prosecutorial and litigation policies cannot be achieved in all cases by pre-prosecution or trial supervision alone. In rare cases control at a later stage is required. The Department, in the exercise of its responsibility for equitable and orderly law enforcement, should be able to move to dismiss, and the court has the power to terminate, during the appellate proceedings, the few matured criminal prosecutions which have been determined to be inconsistent with the interests of justice or sound administration.

B. THERE IS A CLOSE PARALLEL FOR THIS PURPOSE BETWEEN CIVIL AND CRIMINAL LITIGATION

In civil proceedings, the power of the Government to move to have a lower court judgment in favor of the United States vacated and its complaint dismissed has never been doubted, and any distinction in this respect between a civil case and a criminal case is, we believe, more conceptual than real. It is true that a criminal

case is not a purely adversary proceeding and that there is an independent public interest in the outcome. But that is just as true of all "regulatory" litigation by the Government, and may well be true even of litigation in which the Government is asserting a pecuniary claim. In antitrust litigation, for example, it is difficult to see how the public interest is any less involved in sustaining an injunction than it is in sustaining a relatively small fine imposed in a criminal proceeding, and only last Term an antitrust injunction was vacated on motion of the Government in order to permit it, for policy reasons, to move to dismiss its complaint. *Guerlain, Inc.* v. *United States,* 358 U.S. 915. In criminal cases themselves, moreover, the prosecuting authorities have virtually complete control over the initiation of cases, and there is nothing different in kind in continuing prosecutorial control throughout the subsequent stages—where, in fact, because of the necessity for judicial action to vacate the judgment, such action would be subject to much greater supervision by the courts.

In sum, the public interest is involved in all Government litigation, and in all cases its effectuation necessarily depends primarily upon the judgment and good faith of the responsible Government officials. Where the proposed dismissal requires the action of the courts, as does a motion to vacate a judgment, the public interest no doubt justifies a closer scrutiny of the motion, to guard against an abuse of discretion, than might be appropriate in a case involving only private interests, but if the reasons for the action pass

that scrutiny there is no more reason in a criminal case than in a civil case to deny the power altogether.

That the power of the Government to move to terminate a civil proceeding after a judgment in favor of the United States derives from no different sources than the procedure suggested here is evident from the *Confiscation Cases*, 7 Wall. 454, one of the earliest decisions considering the authority of the Attorney General to control Government litigation. There, libels had been brought for forfeitures of certain vessels that had been used in aid of the rebellion, and decrees against six of the vessels were entered in the circuit court. On the appeal of the owners to this Court, the Attorney General, for reasons not disclosed in the opinion, moved that the decrees in favor of the United States be set aside and the libels be dismissed. In granting the motions, the Court, after summarizing the power of the United States Attorneys, subject to supervision by the Attorney General, to dismiss both criminal and civil cases in the circuit courts, observed (p. 458):

> Such control on the part of the district attorney ceases whenever such a suit, civil or criminal, is transferred to this court by writ of error, appeal, or certificate of division of opinion, as the thirty-fifth section of the Judiciary Act also provides, that it shall be the duty of the Attorney-General to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and such has been the unbroken practice of this court in such suits from the organization of the judicial system to the present time. Appointed, as the Attorney-General is,

> in pursuance of an act of Congress, to prosecute and conduct such suits, argument would seem to be unnecessary to prove his authority to dispose of these cases in the manner proposed in the respective motions under consideration * * *.

While those cases involved proceedings traditionally treated as "civil," nothing in the opinion suggests a distinction between the power to dismiss civil cases and the power to dismiss criminal cases, and the grounds upon which the Court relied would seem equally applicable to both. Moreover, a proceeding to enforce a forfeiture of property because of its use in the commission of a crime, although historically denominated as "civil," in fact vindicates essentially the same interests as does a criminal proceeding. Nor is there any other respect in which the differences in the two kinds of proceedings would seem to be relevant to the proper scope of the powers and duties of the Department of Justice in prosecuting them. If the Department may, for sound policy reasons, decline to defend a forfeiture decree in favor of the United States, it ought also be able, for similar reasons, to move to discontinue a criminal case that has been successfully prosecuted in the lower courts.

C. THE COMMON LAW LIMITATIONS ON THE ENTRY OF A *NOLLE PROSEQUI* ARE NOT APPLICABLE TO A DISMISSAL WITH PREJUDICE

A motion addressed to the court to vacate a judgment of conviction and dismiss the indictment rests, to some extent, upon different premises and serves a different function than the entry by the prosecutor of a common law *nolle prosequi*. To the extent that the development of the *nolle prosequi* power at common

law is relevant, however, we think it lends support to the procedure suggested here.

The essential characteristic of a *nolle prosequi* as it was known to the common law was that it was a dismissal of the indictment *without prejudice*.[5] By definition, a *nolle prosequi* was a dismissal which, although terminating the proceedings on the dismissed indictment, did not bar a subsequent reindictment and trial of the defendant, and it was in terms of that function of a *nolle prosequi* that the limitations on its entry were developed. Thus, although the prosecutor had unfettered discretion to enter a *nolle prosequi* at any time prior to trial,[6] it was said that he could do so during the trial only with the consent of the defendant. The reason for that limitation was simply that the defendant, having once been put in jeopardy, was entitled to a final disposition of the cause unless he waived that right by consenting to a dismissal without prejudice—*i.e.*, to a *nolle prosequi*. See *Commonwealth* v. *Tuck*, 20 Pick. (Mass.) 356, 365. Properly understood, therefore, the limitations on the entry of a *nolle prosequi* were limitations, not on the power of the prosecutor effectively to terminate the proceedings, but only on his right to do so without prejudice.[7]

---

[5] *Dealy* v. *United States*, 152 U.S. 539, 542; *Queen* v. *Bidpath*, 10 Mod. 152; *Goddard* v. *Smith*, 87 Eng. Rep. 1007, 1008-1009.

[6] *Confiscation Cases*, 7 Wall 454, 457; *United States* v. *Brokaw*, 60 F. Supp. 100 (S.D. Ill.); *United States* v. *Woody*, 2 F. 2d 262 (D. Mont.). In England, the Attorney General still retains the absolute prerogative to enter a *nolle prosequi*. *Reg.* v. *Dunn*, 1 C. & K. 728; *Reg.* v. *Allen*, 5 L.T.R. 636.

[7] It is this common law concept of a *nolle prosequi* that is embodied in Rule 48(a) of the Federal Rules of Criminal Procedure, which provides that:

Although in concept a dismissal without prejudice, the entry of a *nolle prosequi* did operate in some cases to bar subsequent reindictment. That occurred when the prosecutor entered a purported *nolle prosequi*, without the consent of the defendant, after jeopardy had in fact attached. In such cases, the courts, although they could not interfere with the power of the prosecutor to terminate the prosecution, held that the prosecutor had no "right" to enter a *nolle prosequi* (*i.e.*, a dismissal without prejudice) and, in order to protect the defendant against double jeopardy, treated the dismissal as one with prejudice, having the same effect as an acquittal. See, *e.g.*,

---

The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

As the requirement of consent after jeopardy has attached demonstrates, that Rule was simply a codification of the traditional *nolle prosequi* power, the only change intended being the requirement, unknown to the common law, that leave of court be obtained before filing the dismissal. See Advisory Committee Notes to Rule 44, Preliminary Draft (1943), and Rule 50, Second Preliminary Draft (1944); 6 Proceedings of N.Y.U. School of Law Institute 170–171 (1946); *Dortch* v. *United States*, 203 F. 2d 709 (C.A. 6), certiorari denied, 346 U.S. 814; *United States* v. *Shanahan*, 168 F. Supp. 225, 230 (S.D. Ind.); *United States* v. *Dorrego*, 17 F.R.D. 340 (D.P.R.). Because of that obviously limited purpose of the Rule, we do not rely on its broad language, which is not in terms limited to pre-conviction dismissals, in support of the motion in this case. The Rule is not addressed to the power of a court to dismiss a judgment of conviction in order to permit dismissal of the indictment—a question that had not theretofore been presented—and whatever power the courts might otherwise have in that respect is neither enlarged nor restricted by the Rule.

United States v. *Shoemaker*, 2 McLean 114 (C.A. 7); *United States* v. *Farring*, Fed. Cas. No. 15,075 (C.C.D.C.). In *Commonwealth* v. *Smith*, 149 Mass. 7, 8, the Supreme Judicial Court of Massachusetts said:

> * * * The true rule would seem to be, that, after a trial has commenced, the Commonwealth's attorney, though he has the power, has not the right, to terminate the prosecution without a verdict; and his refusal of record to further prosecute the indictment has the effect of and amounts to an acquittal of the defendant, unless it is done with his consent. * * *

See also to the same effect, as indicating that a dismissal by the prosecution after verdict but before sentence would operate in bar of a subsequent prosecution for the same offense, *Commonwealth* v. *Tuck*, 20 Pick. (Mass.) 356; *Fletcher* v. *United States*, Fed. Cas. Nos. 4868–4869 (C.A.D.C.); *Mount* v. *State*, 14 Ohio Rep. 295, 303.

The true explanation of the common law rule, therefore, would seem to be that there was in fact no limitation on the power of the prosecutor to cause a criminal prosecution to be terminated and the only question was what effect should be given to that action. If jeopardy had not yet attached or the defendant consented, entry of a *nolle prosequi* did not operate to bar a reindictment. If jeopardy had attached, however, it was said that the prosecutor had no "right" to enter a true *nolle prosequi*—one without prejudice—and his dismissal of the case would operate to bar reindictment. In either event,

there was no question of the effectiveness of the dismissal to terminate the prosecution.[8]

If, as we think it did, the common law thus recognized the power of the prosecutor to dismiss a criminal case after jeopardy had attached, though with prejudice, we see no reason why he should not be able to move to dismiss with prejudice after conviction but while the judgment is still within the control of the courts. Since there is then a judgment outstanding, the prosecutor of course cannot dismiss the case by his own unilateral act (as in the case of a common law *nolle prosequi*) and must instead invoke the action of

---

[8] There are two state cases which seem to hold that an attempted dismissal by the prosecutor after conviction is ineffective, but they can be explained, we think, on the ground that the dismissal was sought at a time when the court itself no longer had general power to vacate the judgment. See note 3, *supra*. Thus, *State ex rel. District Attorney* v. *Judge*, 48 La. Ann. 109, 35 L.R.A. 701, essentially reflects the concept that the dismissal power persists only so long as the court in which the dismissal is sought to be entered has authority under its general jurisdiction to overturn a jury verdict. In that case, the single remaining function of the trial judge, when the dismissal was sought, was to sign the formal judgment and pronounce sentence; significantly, a motion for a new trial had already been denied. Similarly, in *Commonwealth* v. *Dascalakis*, 246 Mass. 12, the attempted entry of the dismissal occurred after the power of the trial court to deal with the case under its general jurisdiction was over. For that reason, and the further reason that the dismissal issue was before *it* on collateral attack, the Supreme Judicial Court of Massachusetts held that the Attorney General of the Commonwealth had no authority in the premises. Whether or not those cases can be so explained, however, we find in their opinions no valid reasons of policy or otherwise why a court before which a criminal conviction is pending on direct review cannot, on motion of the highest prosecutorial authorities supported by valid reasons of policy, vacate the judgment and dismiss the indictment.

the court to vacate the judgment and dismiss the indictment. While it is the court's power rather than the prosecutor's that is then being exercised, the same considerations that underlie the prosecutor's power to dismiss prior to judgment—the primary responsibility of the executive for the proper conduct of criminal litigation—equally empower the courts, upon motion of the prosecutor, to vacate a nonfinal judgment and direct dismissal of the indictment. The only difference of substance is that, because judicial action is required, the courts have a greater responsibility to satisfy themselves that the reasons for the motion are adequate.

III

THIS COURT MAY MAKE A FINAL DISPOSITION OF THE MOTION AND A REMAND OF THE CASE TO THE DISTRICT COURT FOR CONSIDERATION OF THE MOTION IS UNNECESSARY

If the Court agrees that it has power to vacate the judgments below in order to permit dismissal of the indictment, there would remain only the question whether this Court should itself pass on the motion to dismiss or should vacate the judgments below and remand the case to the district court to permit that court to entertain the motion. Either procedure is of course proper, and no consistent pattern appears in the Court's disposition of similar motions in civil cases. In the *Confiscation Cases, supra,* for example,

the Court vacated the decrees and remanded the cases with directions to dismiss the libels, while in the *Guerlain* case, *supra*, the Court vacated the judgment and remanded the case without directions to permit the district court to pass on the motion to dismiss. Which procedure is appropriate depends simply on the balance of convenience in the particular case. Here, we think, there are several factors which suggest that the balance lies with final disposition of the motion by this Court: (1) the motion is based solely on general policy reasons the adequacy of which can be as readily appraised by this Court as by the district court; (2) the case is pending in this Court on the merits and it is appropriate that the motion be finally disposed of by this Court so that, if it is ultimately to be denied, the disposition of the case on the merits will not be delayed; and (3) the Court may find it necessary or appropriate to consider the reasons for the motion in this case in deciding the general question whether it has the power to vacate a criminal conviction to permit a dismissal of the indictment and, if it does, there would seem little reason to require a further consideration of the motion by the district court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this motion should be granted and that an order should be entered vacating the judgments of the district court and of the court of appeals and

remanding the case to the district court with directions to dismiss the indictment.[9]

J. LEE RANKIN,
Solicitor General.
MALCOLM R. WILKEY,
Assistant Attorney General.
WAYNE G. BARNETT,
Assistant to the Solicitor General.
BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

DECEMBER 1959.

---

[9] Should this motion be denied, the Government requests that it be allowed thirty (30) days from and after the date of the order denying the motion within which to file its brief on the merits.

APPENDIX

DEPARTMENT OF JUSTICE PRESS RELEASE, APRIL 6, 1959

* * * * *

MEMORANDUM TO THE UNITED STATES ATTORNEYS

In two decisions on March 30, 1959, the Supreme Court of the United States reaffirmed the existence of a power to prosecute a defendant under both federal and state law for the same act or acts. That power, which the Court held is inherent in our federal system, has been used sparingly by the Department of Justice in the past. The purpose of this memorandum is to insure that in the future we continue that policy. After a state prosecution there should be no federal trial for the same act or acts unless the reasons are compelling.

In *Abbate* v. *United States* and *Bartkus* v. *Illinois* the Supreme Court held that there is no violation of the double jeopardy prohibition or of the due process clause of our federal Constitution where there are prosecutions of the defendant, both in the state and in the federal court, based upon the same act or acts.

This ruling reaffirmed the holding in *United States* v. *Lanza*, 260 U.S. 377, decided by the Supreme Court in 1922. In that case Chief Justice Taft, speaking for a unanimous Court, said:

> We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory * * *. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.

> It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.

But the mere existence of a power, of course, does not mean that it should necessarily be exercised. In the *Bartkus* case the Court said:

> The men who wrote the Constitution as well as the citizens of the member states of the Confederation were fearful of the power of centralized government and sought to limit its power. Mr. Justice Brandeis has written that separation of powers was adopted in the Constitution "not to promote efficiency but to preclude the exercise of arbitrary power." Time has not lessened the concern of the Founders in devising a federal system which would likewise be a safeguard against arbitrary government. The greatest self-restraint is necessary *when that federal system yields results with which a court is in little sympathy.* [Emphasis added.]

The Court held then that precedent, experience and reason supported the conclusion of separate federal and state offenses.

It is our duty to observe not only the rulings of the Court but the spirit of the rulings as well. In effect, the Court said that although the rule of the *Lanza* case is sound law, enforcement officers should use care in applying it.

Applied indiscriminately and with bad judgment it, like most rules of law, could cause considerable hardship. Applied wisely it is a rule that is in the public interest. Consequently—as the Court clearly indicated—those of us charged with law enforcement responsibilities have a particular duty to act wisely and with self-restraint in this area.

Cooperation between federal and state prosecutive officers is essential if the gears of the federal and state systems are to mesh properly. We should continue to make every effort to cooperate with state and local authorities to the end that the trial occur in the jurisdiction, whether it be state or federal, where the public interest is best served. If this be determined accurately, and is followed by efficient and intelligent cooperation of state and federal law enforcement authorities, then consideration of a second prosecution very seldom should arise.

In such event I doubt that it is wise or practical to attempt to formulate detailed rules to deal with the complex situation which might develop, particularly because a series of related acts are often involved. However, no federal case should be tried when there has already been a state prosecution for substantially the same act or acts without the United States Attorney first submitting a recommendation to the appropriate Assistant Attorney General in the Department. No such recommendation should be approved by the Assistant Attorney General in charge of the Division without having it first brought to my attention.

[s] WILLIAM P. ROGERS,
Attorney General.

U.S. GOVERNMENT PRINTING OFFICE: 1960